#### UNITED STATES OF AMERICA

#### **BEFORE THE**

#### NATIONAL LABOR RELATIONS BOARD

In the Matter of: Case No.: 12-CA-076395

A/C SPECIALISTS, INC.,

Respondent,

And

UNITED ASSOCIATION OF PLUMBERS PIPEFITTERS & HVAC REFRIGERATION MECHANICS, LOCAL UNION 123, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

**Charging Party.** 

BRIEF IN OPPOSITION TO RESPONDENTS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

#### I. STATEMENT OF THE CASE

Administrative Law Judge George Carson issued his Decision on October 12, 2012. He found that the Respondent had unlawfully fired the entire bargaining unit on March 9, 2012 shortly after a demand for recognition had been made by two union representatives at a visit to Respondent's air conditioning shop. Employees were told that the company would never be union. When the employees turned in their vehicles, the employer sought the arrest of Jim Stahl, the employee identified as the ring leader of the organizing drive.

The employer found that the mass discharges violated 8(a)(3) of the Act. He also found statements that no union would be permitted were a violation of Section 8(a)(1) of the Act as they indicated to the employees that it was futile to seek union representation. The attempt to have Jim Stahl arrested for his organizing efforts was also found to be a violation of Section 8(a)(1) of the Act.

To remedy these violations, the Administrative Law Judge recommended the issuance of a Gissel bargaining order. He found that the Union had requested recognition on the basis of authorization cards signed by each of the three service technicians. He also found that this was a Category I Gissel case which involved "outrageous and pervasive" unfair labor practices. The Judge concluded that traditional remedies could not erase the coercive effects of the unfair labor practices which made a fair election impossible. Accordingly, in light of the mass discharge of the entire unit, accompanied by statements that joining a union was futile and the

attempt to have the lead organizer arrested in the presence of the other employees, the ALJ recommended the issuance of a bargaining order.

## II. EXCEPTIONS BY RESPONDENT'S EXCEPTIONS

#### A. Introduction: The limited scope of Respondent

The facts set forth herein are largely uncontested and not the subject of exceptions. The Respondent chose to file a single document entitled "Respondent's Exceptions to the Decision of the Administrative Law Judge." This document is in the form of a brief. Section 102.46(b)(1) of the Board's Rules and Regulations require that exceptions be set forth with specificity and clarity:

- 1. The questions of procedure, fact, law, or policy to which exception is taken;
- 2. Identify the part of the administrative law judge's decision to which objection is made;
- 3. Designate by page those portions of the record upon which the exception is based; and
- 4. State concisely the basis for the exception including a citation of authorities whenever a supporting brief is not filed.

The Board requires specificity in the drafting of exception to an administrative law judge's decision and has noted that "it is the excepting party's duty to frame the issues and present its case to the Board. *James Troutman & Associates*, 299 NLRB 120, 121 (1990).

The Charging Party urges the Board to closely consider what matters have been excepted to by the Respondent and, in accordance Section 102.46 (b) (2), "any exception to a ruling, finding, conclusion or recommendation which is not specifically urged shall be deemed to have been waived."

The Respondent's Exceptions contest the finding that Respondent fired the employees for their union activity. Rather, the Respondent claims that the Employer was confused about the nature of union membership and its consequences on the employment relationship. The Respondent maintains that the discharges flowed from a "misperception" that union membership and continued employment were mutually exclusive.

The Respondent also claims that Jim Stahl was fired for earlier misconduct relating to improper use of a company vehicle and the improper purchase of tools without authorization. Respondent claims that this earlier conduct was never condoned and therefore should be accepted as the real basis for Stahl's discharge.

The Respondent also excepts to the recommendation of a Gissel bargaining order. The Respondent maintains that there was no evidence that the Respondent's action had undermined support for the Union. Accordingly, Respondent would require the Union to file and election petition to secure majority status.

#### III. ISSUES PRESENTED BY RESPONDENT'S EXCEPTION

- 1. Did the Respondent violate 8(a)(3) of the Act by firing the three employees shortly after the Union Representatives had visited the shop to seek union recognition?
- 2. Was Jim Stahl fired for earlier misconduct that Respondent claims was never condoned?
- 3. Did the ALJ properly recommend a Gissel Bargaining Order to remedy the egregious violations found to have occurred?

#### IV. STATEMENT OF FACTS

#### A. <u>Background Facts</u>

A.C. Specialists, Inc. (hereinafter ACS or Respondent) is a contractor based in Tampa, Florida, engaged in the sales<sup>1</sup>, service, and repair of residential air conditioning systems. (Dave Winston 18.) In the early months of 2012, the company employed three service technicians, James Stahl, Mike Noel, and Jerome Gordon. *Id.*<sup>2</sup> ALJD2:20-21. The company was owned by Tim Winston in close consultation with David Winston, his father and the former owner of the company. (*Id* 24.) ALJD2:16-17. Two office employees worked at the shop, Kristy Winston, who served as a dispatcher, and Mary Winston, who occasionally helped out at the shop performing administrative and clerical duties.<sup>3</sup>

#### B. Union Organizing Begins at ACS

In early February, technician Jim Stahl contacted Todd Vega, the Business Manager of United Association Local 123 (also known as Pipefitters Local 123), to inquire about union representation at ACS. (Vega 126.) Vega referred the call to Russell Leggette, an organizer for the Florida Pipe Trades which consists of various United Association Local Unions engaged in the piping trades in the state of Florida.

Leggette spoke to Stahl on several occasions concerning organizing the shop and Stahl, in turn, spoke to his fellow employees. A meeting was scheduled at a restaurant in Brandon, Florida on February 23, 2012 with the three ACS service

<sup>&</sup>lt;sup>1</sup> References to the transcript shall be to the witness followed by the transcript page. References to the decision of the Administrative Law Judge shall be by ALJD followed by page number.

<sup>&</sup>lt;sup>2</sup> The Employer's amended answer admits that a unit comprised of all full-time and regular part-time service technicians employed by the Respondent at its Tampa, Florida facilities, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act is an appropriate unit within the meaning of Section 9(b) of the Act.

<sup>&</sup>lt;sup>3</sup> Kristy Winston is the sister of Tim Winston and David Winston's daughter. Mary Winston (a.k.a. Fran Winston) is the mother of Tim Winston and married to David Winston.

technicians to discuss the advantages of union representation at ACS. The three employees signed authorization cards at the meeting designating Local 123 as their bargaining representative. (Leggette 93-95.) ALJD2:4-15.

Leggette explained to the employees that the authorization cards could be used for an NLRB election or for voluntary recognition by the employer but that he needed to check with legal counsel on how to proceed. ALJD4:15-18. Leggette felt that a request for recognition was the better way to proceed because the election route would be slower. (Leggette 114-115.) Leggette asked the employees to think it over and advise him if they wished to proceed and how they wished to proceed. Stahl called Leggette in early March and informed him that the employees wished to go forward with a presentation of the authorization cards to the employer to secure representation. (Stahl 233.) ALJD4:20-22. Leggette agreed to do so and alerted Stahl that he would visit the shop on the morning of March 9, 2012 to demand recognition on the basis of the authorization cards. (Leggette 98.) Stahl in turn alerted Gordon and Noel that the Union was requesting recognition as the majority representative but that they should be prepared for a negative response, including the possibility of discharges. ALJD4:25-28.

# C. <u>Visit to the Shop to Request Recognition</u>

Leggette asked Local 123 Business Manager Vega to accompany him to the visit to ACS. They arrived sometime around 9:00 a.m. on March 9. Leggette was the spokesman. ALJD4:35. When they entered the shop, Leggette asked to speak to the owner, Tim Winston. The two clericals Fran Winston and Kristy Winston, who sat at a desk to the left of the door called for Tim Winston who was in an office to the right

of the door. ALJD4:31-33. When Tim Winston appeared, Leggette said that they were from the Pipefitters Union and were out speaking to contractors. (David Winston 24; Leggette 100; Vega 128.) ALJD4:37-38. Tim Winston replied that "he was fine and didn't need help from the Union." (Leggette 100.) ALJD4:38-39. David Winston then appeared from the office on the right and joined the conversation. David Winston said that he wasn't hiring union people and had no use for the Union. *Id.* ALJD4:39-41. Leggette replied that his employees wanted to be union. ALJD4:41-42.

David Winston was agitated and denied that Leggette had spoken to any of the employees. (Vega 128, 130.) ALJD4:42. When Leggette insisted that he had, David Winston asked when and where. ALJD4:43. Leggette responded that it was none of his business how the Union had contacted the employees. ALJD4:43-44. Leggette then stated that the employees wanted union representation and, to that end, wanted either an election or recognition of the Union as the majority bargaining representative based on union cards. (Leggette 100-101.) ALJD4:43-47.

Leggette asked the Winston's if they wanted to see the authorization cards signed by the employees. Both Winston's replied in the affirmative placing the three cards on a yellow tablet, and holding the cards with his thumb, Leggette extended the cards to Tim and David Winston. (Leggette 101; Vega 129.) Upon examining the cards, David Winston said, "Fuck the Union" and added that "Unions have ruined the country." (Leggette 101.) He then asked the two union representatives to leave the premises. ALJD4:48-51.

#### D. Discharge of Service Technicians

Minutes after the two union representatives were told to leave the ACS shop, David and Tim Winston called the service technicians who were each en route to their initial service call of the day. David Winston spoke to Gordon and Stahl. Tim Winston spoke to Gordon, Stahl and Noel. Each of the technicians was interrogated concerning their union activity and fired. All three technicians were asked to return their trucks to the shop.

#### 1. The Discharge of Jerome Gordon

The first person who David Winston called was Jerome Gordon. David Winston asked him who was the union guy he had talked to and what made him want to talk to the Union. (Gordon 195). He added that there wasn't going to be a union at ACS: "This isn't a union shop and if I wanted to be in a union, then I needed to get a union job." He also said that "unions destroy lives." (*Id.*) Gordon responded that he thought a union was a good idea. (*Id.*) David Winston repeated that there would be no union at ACS and when Gordon did not respond, he was told that he needed to decide. (*Id* at 196.) ALJD5:31-36. In other words, he could remain with the company and forsake the Union or cast his lot with the Union which meant termination.

Gordon called back and spoke to Tim Winston. He told Tim Winston that "I wanted to be union." (Gordon 196.) Tim Winston asked if he was going to complete his service call. Gordon responded that if he is being fired, he should turn his truck in now. *Id.* ALJD5:37-41.

#### 2. The Discharge of Michael Noel

Michael Noel testified that Tim Winston called him shortly before he arrived at his first service call on March 9. Tim Winston asked what the union stuff was all about. (Noel 153.) Noel admitted that he had joined the Union. (*Id.*) Winston replied by asking why Noel would contact the Union since he could come to him with any problems. (*Id.*) Noel tried to assure Tim Winston that "it wasn't against him." (Noel 153.) Tim Winston replied that it had everything to do with him, then accused him of contacting the Union behind his back. (*Id.*) Noel was instructed to finish his call and come in and turn in his company tools and equipment." (Noel 153) ALJD5:51-52, . ALJD6:1-4.

#### 3. The Discharge of James Stahl

Jim Stahl was called by David Winston shortly after the departure of the two union representatives from ACS. Stahl testified that Winston started out the conversation by asking him "what the fuck was I trying to do to him. I know you're (Stahl) behind this." (Stahl 234.) Stahl replied that he had signed a union card and that all the employees had signed cards. (*Id.*) David Winston told Stahl that this [the Union] was not going to happen and that Stahl no longer had a job. (*Id.* at 235) ALJD6:29-33.

Several minutes later Tim Winston called Stahl and asked him to finish his initial service call before he turned his truck back in. (*Id.* at 236.) Stahl called back and told Tim Winston that under the circumstances he didn't think it was appropriate to finish the call. (*Id.*) Tim Winston angrily called Stahl a "treasonous fucker" and told him to "turn the vehicle in" and "come and see him face to face and see what

happens." (Stahl 236) ALJD6:35-40. Stahl responded that he did not have a problem with him or with his sister Kristy, the dispatcher, and that, "I was just concerned with working conditions." (*Id.*)

#### E. The Discharged Employees Turn in Their Trucks

Having been fired by Tim and/or David Winston, the three service technicians conferred among themselves by phone. They agreed to meet at Stahl's hotel and to drive together to the office. Personal tools that had not been off loaded earlier were unloaded at the motel. Stahl also took the initiative to contact a Hillsborough County Sheriff to escort them to the office. (Stahl 18) ALJD7:1-5. He was concerned about the angry response from Tim and David Winston. He was especially concerned by Tim Winston's threat that when he returned his truck that he was to see him face to face and see what happens. (Stahl 236, 254.) Stahl also was concerned that the situation could get out of hand given the fact that Tim Winston was known to sometimes carry a concealed weapon and David Winston was also a gun enthusiast. (Stahl 291.)

The three employees met the Hillsborough Deputy at a nearby gas station and proceeded to ACS to return the truck. When they arrived David Winston pointed to James Stahl and said: "That mother-fucker right there is the reason you don't have jobs." (Stahl 238; Noel 154; Gordon 198) ALJD7:7-8. Tim Winston confronted Stahl and called him a "treasonous cocksucker" and threatened to ruin him. (Tim Winston 238) ALJD7:8-9. Stahl attempted to defuse the situation by explaining that "they just

and doubled back to meet together at Stahl's hotel after they had been fired. (Noel 153; Stahl 234.)

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<sup>&</sup>lt;sup>4</sup> Dave Winston checked the office GPS tracking device and discovered that the company trucks were congregated close to the office. From this he concluded that they had never actually gone to the field to their first service call. However, it is clear that the employees were in route to their first service calls

wanted to work there, and that they wanted to negotiate." *Id.* Tim Winston turned to the police officer and said that he wanted him arrested for "having the union" and then later added that it was because he had personal tools purchased on the company account. (*Id.* 238) ALJD7:10-12. The deputy responded that he was only there to keep the peace. (Noel 155.)

After Gordon turned in his keys and company phone he put on a union pin. David Stahl told him: "I don't care about you putting your union pin on. We are not going to be union here." (Gordon 199), ALJD7:13-14. As the employees left the yard, David Winston gave a parting shot as the employees left the premises: "Good luck finding a union job in this town. If you want to find a union job, you're not going to find it here." (Noel 155.)

#### V. ARGUMENT

# A. The Discharges Were For Union Activity in Violation of 8(a)(3) of the Act

A stronger case for a finding of discriminatory discharges is hard to imagine. The Union representatives approached the employer on the morning of March 9 to claim that it had authorization cards from the employees. These authorization cards were offered up for inspection, and Leggette demanded recognition for the Union as the majority representative of the employees. ALJD4:44-47; 5:16-22. While there was some variance in exactly what was said, every witness acknowledged that Russell Leggette stated that he had talked to the ACS employees, that they wanted a union and he had authorization cards from the employees.

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<sup>&</sup>lt;sup>5</sup> The company was deducting agreed-upon amounts from Stahl's paycheck to reimburse the company for the purchase of the tools. (Stahl 267.)

Retribution was swift and severe. The employees were called by David and/or Tim Winston soon after the Union representatives were told to leave the ACS premises. Each employee was interrogated about the Union and each employee was terminated and told to return their truck to ACS. It is also uncontested that no employee quit or resigned; they were fired. About a month after the terminations, the company offered reinstatement to Noel and Gordon. They returned on or about April 11.6 No offer of reinstatement was made to Jim Stahl.7

We shall review the company exceptions to the 8(a)(3) findings of the ALJ to show they have no merit.

# B. <u>Defense of Job Abandonment</u> No Employee Stated he was Going to Work for the Union

The principal defense of the Respondent appears to be the contention that the employees stated that they were "going to work for the Union" or the mistaken belief of the Winston's that union membership necessarily meant that the employees had to abandon their jobs. The Winston's testified that the terminations were based on their profound misunderstanding of how unions worked and the belief that employees who became union members could no longer be employed by ACS, a non-union company.

This defense must fail for several reasons. First, David Winston, who fired both Stahl and Gordon, made no claim that either Gordon or Stahl said that they were going to work for the Union. According to David Winston, he called Gordon and asked him what the Union stuff was all about. Gordon replied that he had talked to the

Respondent's reference to a reinstatement offer to Stahl is not based on the record. *See* Motion to Strike.

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<sup>&</sup>lt;sup>6</sup> The employer paid backpay owed to these two employees but the parties agreed to disagree on whether they were made whole. (*See* transcript 16-17.) This is an issue for compliance as noted by the ALJ. ALJD11:46-49 fn.3.

Union and had joined the Union. (David Winston 27.) David Winston replied that ACS was not a union shop and he should return his truck. (Winston 22).

Gordon's credited testimony is consistent with David Winston's testimony. Gordon testified that when David Winston called there was a short discussion of Gordon's contact with the Union. Dave Winston made it clear to Gordon that there was not going to be a union at ACS, that ACS was not a union shop and if he wanted to be in a union, he had to leave ACS and get a union job. (Gordon 195.) Dave Winston said that Gordon had a choice to make, that he could remain non-union and continue to work for the company or he could be fired. (Gordon 196) ALJD7:51-52; 8:1-5.

When Gordon called ACS back he spoke to Tim Winston. Gordon told Tim Winston that he wanted to be union. (Gordon 196.) In other words, he made the choice pressed upon him by David Winston. Tim Winston asked if he wanted to complete his morning service call and Gordon replied that if he was fired he should return his truck immediately, ALJD8:20-24.

Tim Winston's testimony that Gordon called to tell him he was "working for the Union" makes no sense and was properly discredited by the ALJ., ALJD6:13-20. The statement was not true. No one contends that Gordon had secured a job with the Union or a union contractor. It defies reason that Gordon would make a false statement against his interest. Tim Winston's phone conversation cannot be taken in isolation. It followed on the heels of the conversation that Gordon had just had with Tim Winston's father where he was given an ultimatum that he had to be non-union or could no longer work for the company.

Stahl was also not fired for taking a job with the Union or a union contractor. Stahl was contacted by David Winston shortly after he spoke to Gordon. David Winston assumed that Stahl was the moving force, the instigator of the union drive. (David Winston 23, 28.) David Winston asked Stahl about the Union. According to David Winston, when Stahl affirmed that he had talked to the Union and that it was going to be a hot summer and we needed to talk, Winston brusquely responded that he should return his truck to ACS. (David Winston 28.) David Winston acknowledged at the hearing that "he felt that him (Stahl) being a member of the Union and being an employee of your Company were things that couldn't exist." ALJD 6:25-28; (David Winston 27.)

According to Tim Winston, Stahl called him on the morning of March 9, 2012 and indicated that he had talked to the Union and that he felt that the best route for all three employees was to join the Union. (Tim Winston 67-68.) Tim Winston replied that ACS was not a union shop and that if he wanted to work for unions, there was nothing he could do for him. (Tim Winston 68.) Stahl was directed to return his truck to ACS. It is clear even from Tim Winston's testimony that Stahl told him that he had *joined* the Union and that Tim Winston considered this tantamount to working for the Union. Indeed, Tim Winston acknowledged that Stahl never told him that he had decided to work for the Union. (Tim Winston 90.)

In any event, the testimony of Stahl was properly credited by the ALJ. ALJD6:42-52. There was no reason for Stahl to call ACS after being fired by David Winston as Tim Winston testified. Rather, it is far more credible that Tim Winston called to ask Stahl to finish his service call before returning the truck. Stahl thereafter

thought about this request and called back to say that it was not appropriate for him to finish the service call given that he had just been fired. (Stahl 236.) This prompted Tim Winston to angrily tell Stahl that he was a "treasonous fucker"; that he should turn his vehicle in and "come to see him face to face and see what happens." (Stahl 236.)

When Stahl arrived at the ACS facility, he told Tim Winston that "we just wanted to work here. We wanted to negotiate this." (Stahl 238.) This should have removed any purported confusion on the part of Tim Winston that the employees had decided "to work for the Union" or that the natural consequence of joining the Union was to forfeit their jobs at ACS. Rather the employees wished to continue to work for ACS with the benefit of union representation.

The ALJ also properly resolved the conflicting testimony on the question of whether Noel told Tim Winston that he was "working for the Union" by crediting Noel's denial and discrediting the testimony of the Winston's. ALJD6:13-20. Noel testified that Tim Winston called him to ask about the Union and Noel responded by stating that he had joined the Union. (Noel 153.) Tim Winston asked why he would do that when he could come to him with any problems. (*Id.*) Noel said it wasn't against him and Tim Winston replied that it had everything to do with him and that Noel had contacted the Union behind his back. (*Id.*)

Tim Winston testified differently. According to Winston, when he asked Noel what was going on, Noel replied that "he was going to work for the Union." (Tim Winston 66.) Winston claims that he responded by saying that "I don't know how

you're going to work for the Union and for me too." He was told to bring his truck in. (*Id.*)

Winston's testimony is not credible and was properly discredited by the ALJ. First, it is not true. No one contends that Noel had accepted a job or been promised a job with the Union or a union contractor. (Noel 156.) Moreover, it is uncontested that none of the employees tendered their resignation or quit the company. (Tim Winston 71.) It strains credulity that Noel would invent this tale. Rather, either Tim Winston invented this rendition out of whole cloth, or in his mind, joining the union was the same as working for the Union. Indeed, Tim Winston admitted that Noel and the others were fired because they had joined the Union. (Tim Winston 71.) In the eyes of both Winston's, you could not be a union member and an employee of ACS.

We are left with the curious defense that the Winston's action to discharge the employees were not based on the Union activity of the employees and that they should be absolved from responsibility and liability because of their confusion concerning the import of joining the Union. This defense must fall given the admissions cited by the ALJ. David Winston who took the lead to discharge Stahl and Gordon admitted that his actions were motivated by the belief that union membership and continued employment by the Company were "things that couldn't exist." ALJD9:18-19. And Tim Winston when asked whether Stahl was fired "because he had joined the Union", admitted, "He was fired mainly for that." ALJD9:21-23.

The claim that the Winston's were confused about the meaning of union membership and that the discharges were therefore legitimate is not a defense at all.

There is no reason for penalizing employees because the employer mistakenly

believed that joining a union made them ineligible to continue as employees. Indeed, there is no reason to give any credence to the confusion defense. When Stahl arrived at the company premises after his discharge, he told Tim Winston, "we just wanted to work here. We wanted to negotiate this." Moreover, unfair labor charges were initially filed on March 9, 2012 seeking reinstatement to remedy the March 9, 2012 discharges. Despite the Union pressing for reinstatement, the employer did not act until early April, when 10(j) proceedings were pending, to offer reinstatement to Noel and Gordon but not to Stahl, the Union ringleader.

Finally, the employer raises no legitimate basis for the discharges of Noel and Gordon. Only in the case of Stahl did the company contend that there was a reasonable basis for discharge. We shall now turn to the Stahl discharge and the employer's challenge to the condonation theory cited by the ALJ.

# VI. THE ALLEGED MISCONDUCT OF STAHL WAS NOT THE REASON FOR HIS DISCHARGE

Undermining the contention that the employer believed that the ACS employees had abandoned their jobs by joining the Union, two of the employees, Noel and Gordon were offered reinstatement about a month after the discharge. No such offer was made to Jim Stahl who the employer identified as the person responsible for the Union organizing drive. (David Winston 232; Stahl 234.) The company's ire concerning Stahl was vividly demonstrated when the employees drove to the ACS yard to return their trucks. Stahl was singled out in front of the other employees by Dave Winston who pointed to Stahl and said: "That mother-fucker right there is the reason you don't have jobs." (Stahl 238; Noel 154; Gordon 198.) The company

continues to resist the reinstatement of Stahl claiming that he had engaged in disqualifying misconduct.

In early February, about a month before the March 9, 2012 discharge, Tim and David Winston confronted Stahl with the intention of firing him. (David Winston 31, 51; Tim Winston 339.) Stahl was accused of violating company policy by purchasing over \$1,000 in personal tools without required advance approval and charging it to the company. (David Winston 31; Tim Winston 329; Stahl 247.) Employees were permitted to buy tools and charge it to the company and pay the company back by way of payroll deduction but only with the advance approval of the company, according to Tim Winston. (Tim Winston 329). No permission was granted to Stahl. (*Id.*) In addition, Stahl was accused of taking a company vehicle after hours to travel out of town to St. Petersburg at 2:30 a.m. without permission. (Tim Winston 342). Vehicles could be taken home at the end of the work day but, according to Tim Winston, the

According to Dave Winston, he did not follow through in his intent to fire Stahl in early February. (David Winston 32, 51.) He was dissuaded by Stahl's claim that he couldn't be fired because he had filed for personal bankruptcy protection. (*Id.* at 32, 58.) Stahl also convinced Tim Winston that if he remained with the company he would help increase sales. (Tim Winston 331; David Winston 32, 58;) This would include incentivizing the other technicians by changing the compensation to commission as had been done in the past. (Tim Winston 331; David Winston 34). In addition, Stahl suggested, and Dave Winston agreed, that he would impart his sales knowledge to the other service technicians. (David Winston 32). Stahl's sales ability

was considerable as evidenced by his ability to talk his employers out of firing him and to change the conversation to how to improve the company.

While Stahl's version of events of the confrontation in early February was far different, the outcome of the meeting was uncontested. Stahl was not fired and he remained working. (Stahl 250). In addition, there was no contention that his supposed violations of company policy a month early was the reason for his discharge in early March. The March 9, 2012 discharge had no nexus to the violation of the tool policy or misuse of the company truck by a late night out of town trip. (Tim Winston 340.) The company had clearly made its peace with those infractions. Rather, the March 9 incident had everything to do with Stahl's participation in the Union organizing campaign and the company's correct belief that he was the leader of the organizing effort.

Notably, when Stahl was fired there was no mention of the tools. Instead, the discussions centered upon the Union and his perceived leading role in convincing the two other employees to join the Union. He was labeled a "treasonous motherfucker" and when all three employees turned in their trucks, David Winston announced to Gordon and Noel that Stahl was the reason they had lost their jobs. Stahl's outstanding debt for tools purchased in February was only raised after his discharge when the employees returned their trucks.

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<sup>&</sup>lt;sup>8</sup> Stahl testified that when confronted by the Winston's in early February, he was informed that he was being fired because he had filed for bankruptcy. (Stahl 247.) Stahl objected and said: "You can't be fired for bankruptcy, I have a right to do this." *Id.* at 248. Stahl was also told that he could be fired for improperly taking the company van to St. Petersburg and for purchasing tools without permission. Stahl denied acting without permission concerning the van. Stahl and the Winston's were able to reach a resolution by Stahl agreeing to withdraw his bankruptcy petition and to accelerate the deductions from his paycheck to cover the cost of the tools. The threat of discharge was rescinded. (Stahl 246, 267.)

The Respondent argues that condonation requires an employer to completely wipe the slate clean concerning prior misconduct. This, in fact, is what essentially happened in this case. The Winston's were prepared to fire Stahl in February but after talking to Stahl, they backed off, rescinded the discharge and Stahl was permitted to continue to work. In any event, as the ALJ properly found that "Tim Winston acknowledged that he did not decide on Marcy 9 to discharge Stahl for the alleged purchase [of tools] or misuse of a vehicle. Asked whether Stahl was fired 'because he had joined the Union', Tim Winston admitted, 'He was fired mainly for that'"

It is clear that Stahl was not fired for the prior incidents and that the employer was content to have Stahl continue to work until they discovered that he was a ringleader of the Union organizing effort. Accordingly, the ALJ correctly found that the discharge of Stahl was a violation of 8(a)(3) and (1) of the Act.

## VII. A GISSEL BARGAINING ORDER IS REQUIRED

The NLRB has long recognized that normal make-whole remedies and notice posting will not always adequately remedy violations of the Act that are so pervasive and serious that they prevent any reasonable chance for a union to conduct a fair election that is not tainted by the lingering effects of the unfair labor practices. In such circumstances the Board will issue a Gissel Bargaining Order requiring an employer to bargain even without either voluntary recognition or an NLRB election certifying the status of the Union as the Section 9(a) representative of the employer.

In determining whether a bargaining order is warranted to remedy an employer's unfair labor practices, the Board applies the test set forth in *NLRB v*.

Gissel Packing Co., 395 U.S. 575 (1969). In that seminal case, the Supreme Court

identified two categories of cases in which a bargaining order would be appropriate absent an election. The first category of cases involves "exceptional cases" marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive practices which nevertheless have a tendency to undermine majority strength and impede election processes." In this second category of cases the court reasoned that the "possibility of erasing the effects of past practices and ensuring a fair election... by the use of traditional remedies, though present is slight and that employee sentiment once expressed [by] cards would, on balance be better protected by a bargaining order." *Id.* at 613, 614-615; *Cassis Management Corp.*, 323 NLRB 456, 459 (1997); *Massachusetts Coastal Seafoods*, 293 NLRB 496, 498 (1989).

## A. Threshold Requirements of Bargaining Order Have Been Satisfied

As attested by the Employer's Answer to the Complaint, the three service technicians constitute an appropriate bargaining unit. These three employees each signed an authorization card authorizing United Association Local 123 to represent them "in bargaining negotiations on all matters pertaining to rates of pay, hours, or any other term of condition of employment." The preamble of the authorization card explains that the "Authorization for Representation" card is an acknowledgement of your desire for a UA local union "to serve as your exclusive bargaining representative with your employer." *See* GC Ex. 3-5.

## B. A Proper Demand For Recognition Has Been Made

The Board requires a showing that a union has demanded or requested recognition or bargaining before an employer can be required to recognize a union under Section 8(a)(5). The Union need not specifically state that it enjoys the support from a majority of the unit, but when the demand is made, the Union must possess signed authorization cards from a majority of the unit. *Decision, Inc.*, 166 NLRB 464, 475 (1967); *Lincoln Mfg. Co., Inc.*, 160 NLRB 1866, 1877 (1966).

No particular form is necessary to establish a valid demand for recognition or bargaining, providing that the demand evidences a desire to negotiate and bargain on behalf of employees that constitute an appropriate unit. *NLRB v. Cofer*, 637 F.2d 1309 (9<sup>th</sup> Cir. 1981), *enforcing* 233 NLRB 527 (1977).

The Union need not state its demand in formal or precise terms. Thus, "where an employer becomes aware, through direct or indirect means, that a third person purporting to act with the authority of the employees intends to bargain on their behalf, the test is met." *Leavitt J. Cofer d/b/a Marysville Travelodge*, 233 NLRB 527, 533 (1977). As stated in *Al Landers Dump Truck, Inc.*, 192 NLRB 207, 208 (1971):

The Board and the Courts have repeatedly held that a valid request to bargain need not be made in any particular form or *in haec verba* so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other conditions of employment.

The case of *Leavitt J. Cofer d/b/a Marysville Travelodge*, 233 NLRB 527 (1977) is instructive. In that case, the Union representative testified that he informed the owner that the Union had signed applications from four employees (a majority) and that the employees were complaining of working conditions and wanted to be

Judge that as the result of this statement "Cofer [the owner] entertained no doubt in his mind but that the employees had designated the Union as their bargaining representative and that Webb [the Union representative] was requesting that he bargain with the Union." *Id.* at 533. The Administrative Law Judge noted further that the result would not have been different if he were to credit the employer's testimony which denied that anything was said about the Union wanting to negotiate on behalf of the employees. *Id.* Instead, the owner testified that the Union representative told him that he "was going to see if he could get their job back or do what he could for them." *Id.* This too was found to be a clear expression of an intent by the Union to bargain on their behalf. *Id.* 

Applying these principles in the instant case, it is clear that the employer was placed on sufficient notice of the Union's intent to bargain no matter whether the testimony of the Union or the testimony of the employer witnesses are credited. The ALJ properly credited the testimony of union organizer Leggette that he told Tim and David Winston that his employees wanted to be union and wanted to be represented by Local 123. Leggette further testified that he told the Winston's that "his employees wanted Local 123 to be the collective bargaining agent for terms and wages and conditions of employment... [and] they either wanted to have an election or for him [the Winston's] to recognize Local 123 as a majority status based on the authorization cards." Leggette then proceeded to show the Winston's the authorization cards. ALJD4:44-47.

These statements of Leggette meet the NLRB criteria for a showing of a request to bargain since it is abundantly clear that Leggette had placed the employer on notice that the Union was seeking to be recognized as the bargaining agent of the employees.

The testimony of the Winston's, even if credited, does not require a different conclusion. David Winston first agreed on cross examination that Leggette had stated that he wanted the company to recognize the Union. (David Winston 42.) When asked if the Union representatives stated they were talking to a contractor about recognizing the Union, his response was "Exactly". (*Id.*) He then went on in almost the same breath to deny that Leggette had ever talked about recognizing the Union on behalf of the employees. (*Id.*)

While Tim Winston denied that a request for recognition was made or that a union election was discussed, he did acknowledge that Leggette stated that he was there "to talk about your employees", and produced cards for inspection on a yellow pad. On cross examination, Timothy Winston was asked if Leggette had said words to the effect that the employees have authorized the Union to represent them. Tim Winston responded: "He said something like that, yes sir." (Tim Winston 69.) The testimony of Mary Winston is also telling. She was asked: "Did you hear them [the two union representatives] say that your employees have signed authorization cards to authorize the Union to represent them? Do you recall them saying that?" Her response was: "Yes, and we didn't understand what they were talking about." (Mary Winston 325.)

Finally, the immediate response by the Winston's to summarily discharge the employees and tell them that the company would never be union leads to the reasonable inference that a request for recognition had been made. Nor can the statements made by the employees be ignored. They show the employees echoed the statements of the Union representatives that they wanted union representation. When Tim Winston spoke to Stahl shortly after the departure of the union representatives, he told Stahl that this was not a union shop and Stahl replied, "It should be." (Tim Winston 68.) Stahl also said that the Union would be a "good arrangement." (Tim Winston 90.) Stahl credibly testified that the purpose of the Union visit was to obtain union recognition. He stated that he told Tim Winston that "I was just concerned with the working conditions." (Stahl 236.) Later, when the trucks were returned and Tim Winston accused him of being a "treasonous cocksucker", Stahl, who was the lead union organizer, replied that he wanted to continue to work with the company and "we wanted to **negotiate** this." (Stahl 238) (emphasis added.) Stahl explained further that when he returned to the yard with his truck, "I told them that we were willing to run the calls, we just wanted to sit down and negotiate better working conditions, that we would run the calls." (Stahl 255.)

Thus, even if Leggette's testimony is not considered, the testimony of Tim Winston, David Winston, Mary Winston, and James Stahl when read together, coupled with the repeated statements by the Winston's that they would never operate a union shop, lead to the inescapable conclusion that the Winston's were very much aware that the visit of the two union representatives was not a social call, and instead conveyed

the clear message that a request had been made by the Union for recognition or to negotiate.

# C. The Mass Discharge of the Entire Bargaining Unit Satisfies the Requirements for the Issuance of a Category I Gissel Bargaining Order

Category One Gissel Orders involve exceptional cases marked by unfair labor practices so outrageous and pervasive that traditional remedies cannot erase the coercive effects which would render a fair election impossible. There are several factors which militate in favor of a Category One bargaining order.

This case features the hallmark violation of discriminatory discharges. As noted by the NLRB:

The discharge of employees because of union activity is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative because no event can have more crippling consequences to the exercise of Section 7 rights than loss of work.

Apple Tree Chevrolet, 237 NLRB 867 (1978).

The devastating effects of a discharge because of union activity is compounded many fold when the entire bargaining unit is discharged in one fell swoop. In ruling that such conduct is the basis for a Category One bargaining order, the Board has explained:

Discharge of an entire bargaining unit is the ultimate retaliation for union activity, the final assault on the employment relationship. It is difficult to conceive of unfair labor practices with more severe consequences for employees or with more lasting effects on the exercise of Section 7 rights. Mass discharges leave no doubt as to the response that the employees will reasonably fear from their employer, if, after reinstatement, they persist in their support for a union.

Cassis Management Corp. 323 NLRB 456, 459 (1997); Allied General Services, Inc., 329 NLRB 568 (1999); Balsam Village Management, Co., 273 NLRB 420 (1984).

Additional factors add support to a finding that a Category One Gissel Order is required. The timing of the discharge, immediately after the visit of the union representatives to ACS, served as a vivid demonstration that a union organizing effort would not be tolerated. In addition, the discharges were meted out by the owner of a small contractor in a manner that left no question of the intensity of the employer's resistance to having any dealings with the Union. The owner of the company interrogated each employee and made statements to the employees that no union would be tolerated at the company. The employees were told that unions had ruined the country and the lead organizer was singled out in the presence of the other two employees as "the mother fucker right here is the reason you don't have your jobs." (Stahl 238; Noel 154; Gordon 198.) The employees were also told: "If you want a union job, you are not going to find it here." (Noel 155.)

The employer seeks to avoid the issuance of a Gissel Bargaining Order by asserting that there has been no showing that the Respondent's actions had an adverse impact on the election process. This argument misses the point. There is some egregious conduct which by its very nature destroys the possibility of a fair election. The Respondent here did not refuse to recognize or bargain with the Union on the basis of a good-faith doubt of the authenticity of the cards, or because that had question concerning the appropriate unit, or because of a preference for an NLRB election. On the contrary, the Respondent exhibited their complete rejection of the collective bargaining process, by pursuing a course of unlawful conduct designed to

completely shatter the ability of the Union to represent their employees. The ALJ correctly found out that the mass discharge, statements that it would be futile to proceed with a union organizing effort, and the attempt to arrest the leading organizer were more than sufficient to support the issuance of a bargaining order.

Reinstatement does not erase the need for a Gissel Bargaining Order. In every case where a Gissel Bargaining Order involves illegal discharges, the Board by definition has concluded that a reinstatement remedy, standing alone, is insufficient to erase the coercive effect of outrageous unfair labor practices. "Mass discharges leave no doubt as to the response that the employees will reasonably fear from their employer if, after reinstatement, they persist in their support for the Union." 323 NLRB at 459 (emphasis added.) The discharges in this small unit administered by high ranking management officials "can only serve to reinforce employees' fear that they will lose employment if they persist in union activity." *Conseq. Security*, 325 NLRB 453, 454 (1998). This severe conduct leaves an indelible impression not easily forgotten.

Reinstatement of some but not all of the discharged employees in the face of a 10(J) proceeding must also be viewed as much as a tactical ploy than a sincere demonstration of a change of heart. We urge the Board to consider that reinstatement without any order of the Board may well be temporal in nature. Employees might well fear that when the District Court proceeding passes and the record is closed in the instant case that the employer could well discharge the employees based on a flimsy pretext accompanied by threats concerning the union as occurred in the first instance.

The clinching argument to view the reinstatement of two of the employees as nothing more than a tactical move is the fact that the company has <u>not</u> reinstated James Stahl, identified as the leader of the organizing drive. By continuing to deny employment to the leader of the organizing drive, the impression is clearly left that if either of the reinstated employees assumes a leading role for the Union, they will suffer the same fate. The company pulled no punches by telling the other two employees that "this motherfucker [James Stahl] is the reason you don't have your jobs." The owner also screamed at Stahl in the presence of the two other service technicians that he was a "treasonous cocksucker" and he would "ruin him." Given the fact that the vendetta against Stahl has continued even after the reinstatement of Noel and Gordon, the outrageous effects of the serious unfair labor practices has not been dissipated and continue to linger and fester.

Even assuming that the Respondent's conduct does not fall within Gissel Category One, the unfair labor practices certainly qualify within the ambit of Category Two violations which, given all the facts and circumstances may be "less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede the election process." *Gissel Packing, supra* at 614. In this regard, we once again stress that the sudden, sweeping and catastrophic retaliation for union activity that occurred in this case by the owner and the past owner is likely to leave an indelible impact on the employees that cannot be adequately addressed by the traditional remedies of the Board. As stated in *Cassis Management, supra* 323 NLRB at 460:

While it is true that the discharged unit employees are entitled to reinstatement and backpay, these remedies would not in our view erase the coercive effect of the Respondent's conduct. The reinstated employees would not likely risk the recurrence of a long period of unemployment by engaging in further attempts to improve their working conditions, in the absence of a bargaining order. And given the swiftness and thoroughness with which the Respondent reacted to the first sign of the Union's presence, the likelihood of it again resorting to illegal conduct is clearly present.

We respectfully request that the Board uphold the ALJ's recommendation that this case satisfies the criteria for a Gissel Category One Bargaining Order and, in the alternative, a Gissel Category Two Bargaining Order.

# D. Even if no Request to Bargain is Found, a Bargaining Order is Necessary

A request to bargain or demand for recognition is a prerequisite to cases where the bargaining order is predicated on Section 8(a)(5). However, no request to bargain or for recognition is necessary when the bargaining order is tailored to remedy serious unfair labor practices apart from 8(a)(5). *Quality Aluminum Products*, 278 NLRB 338, 340 (1986); *Apple Tree Chevrolet*, 237 NLRB 867 (1978); Beasley *Energy, Inc.*, 228 NLRB 93 (1977).

For the reasons set forth in this brief a finding should be made that a request to bargain and recognize has been made that would justify an 8(a)(5) based bargaining order. However, should the there be disagreement with this conclusion there is ample reason to base the Gissel Bargaining Order based on the serious and flagrant violations of 8(a)(1) and (3). Accordingly, we respectfully request a finding that a bargaining order is justified under Section 8(a)(5) and, in the alternative, under Section 8(a)(1) and (3).

#### VIII. <u>CONCLUSION</u>

Respondent's Exceptions to the ALJ's decision have no merit. There is ample evidence, including admissions of the Winston's, in the record to support the ALJ's finding that the discharges of the three union supporters violated 8(a)(1) and (3) of the Act. The claimed confusion and misunderstanding of the Winston's concerning the consequences of joining a union reinforce the conclusion that union membership was the reason for the discharges. The ALJ was correct that the employer condoned the alleged misconduct of James Stahl and that the prior incidents were not the reason for the discharge. Rather, as admitted by Tim Winston the primary reason for Stahl's discharge was his joining the Union.

Given the egregious and pervasive unfair labor practices in this case, the ALJ properly recommended the issuance of a Group I Gissel bargaining order. The swift and complete destruction of this three person bargaining unit just a few hours after the Union requested recognition is compelling grounds for the issuance of a bargaining order, especially when coupled with profanity laced statements that the company would never have a union and the efforts to cause the arrest of the leading union adherent who was called a "treasonous motherfucker", for his support of the Union.

A/C Specialties is an employer that harkens back to the time before the passage of the National Labor Relations Act when employees were compelled to sign yellow dog contracts acknowledging that union membership meant a loss of employment.

Respondent admitted that they believed that union membership and continued employment were incompatible and antithetical. The Exceptions should be dismissed

and the Administrative Law Judge's decision should be upheld except as noted by the Charging Party's cross exceptions.

Respectfully submitted,

DATED: November 26, 2012 By:

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 26<sup>th</sup> day of November 2012, the following document:

Brief in Opposition to Respondents Exceptions to the Administrative Law Judge's Decision

was filed using the Court's ECF filing system and that a notice of such filing was sent electronically to the following:

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